Supreme Court, U.S.
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No. 98-1473

In The

Supreme Court of the United States

October Term, 1998

MICHAEL CARRILLO, WARDEN,

Petitioner,

v.

ADRIAN SALMON,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In July 1992 respondent was arrested and charged with burglary. (SER 119[1]). The state trial court appointed attorney Ted Batsakis to represent respondent. On September 30, 1992, respondent in open court entered into a plea agreement. (SER 124).

Only two weeks later, at the sentencing hearing on October 14, 1992, the court asked Mr. Batsakis whether he wished to make a statement. (SER 277). Mr. Batsakis responded, "Your Honor, I believe the defendant wants to address the court." Respondent then stated, "I want to change my plea, please, to not guilty." In response, the judge asked, "Did you want to say anything, Mr. Batsakis." (SER 277). "No," he answered.

The court then turned to respondent and asked, "What did you want to say, Mr. Salmon?" (SER 277). Respondent attempted to tell the court his reasons for requesting the plea withdrawal:

> Well, because on [sic] the first place the day I was arrested, I was under the effects of drugs. And I asked my attorney to get me a psychiatrist. And he said he couldn't do that. And afterwards, I was offered a deal for seven years, and I was going to take it because I didn't know if I was guilty or not. And for the last time, because my wife is ill, and then after I said that, then he said there was no seven-year deal. I would like to have about a month's time to see if I can get an attorney and to fight my case. And if I could see a psychiatrist.

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[1] The abbreviation "SER" refers to the Supplemental Excerpts of Record filed by petitioner in the Ninth Circuit.

(SER 277). It appears from the transcript that respondent in fact gave his account in Spanish, which was then translated as set out above. (SER 276).

The judge interrupted respondent and noted: "There is no formal motion before this court by you or your attorney. There is [sic] no declarations under penalty of perjury. There is nothing for me to rule on to consider setting aside your plea." (SER 278). He concluded that he would continue with the sentencing, but added:

> [K]nowing that a judge can change his sentencing within sixty days after I do [sic] it, if there is a formal motion between now and the next reasonable length of time, I will consider whether I will reopen both the sentencing and/or have a motion regarding whether you should be allowed to withdraw your plea.

(SER 278). Despite this specific instruction by the court and his client's clear request, Mr. Batsakis never filed a motion to withdraw the guilty plea. Moreover, neither petitioner nor Mr. Batsakis have offered any explanation for Mr. Batsakis' failure to argue in support of his client during the sentencing hearing when respondent attempted to make this *pro se* oral motion.

Following respondent's unsuccessful attempt to withdraw his guilty plea, the judge sentenced respondent to the maximum sentence he could have received had he gone to trial and been convicted: 11 years minus 159 days credit for time served. (SER 282). After sentencing, Mr. Batsakis concededly did not advise respondent that he could appeal or that he would be entitled to counsel if he wished to appeal; Mr. Batsakis himself, without respondent's consent, did not file an appeal. (SER 99 & 110).

Acting without the assistance of counsel, respondent attempted in vain to appeal on his own. Respondent evidently never saw or had further contact with Mr. Batsakis following

the October 14, 1992 sentencing hearing. (SER 95). In late November 1992, acting *pro se*, respondent sent a timely notice of appeal to the Los Angeles Superior Court. (Add. 8[2]). By that point in time respondent was incarcerated at the Wasco State Prison, some 140 miles from Los Angeles.

Court records indicate that respondent's notice of appeal was received on December 10, 1992, but was deemed incomplete because it did not contain certain allegations required under Section 1237.5 of the California Penal Code. (Add. 5). Respondent was notified by the court that "[n]o further action will be taken until such time as you comply with Section 1237.5 Penal Code." (Add. 5). Despite the fact that this initial notice of appeal was submitted *pro se*, the state court neither took steps to provide respondent with counsel nor indicated to him that counsel would be appointed at his request.

In February 1993 respondent filed a second notice of appeal with the superior court. (Add. 4). This second notice of appeal expressly requested that the court appoint counsel to represent respondent.[3] On March 25, 1993, the state court rejected that appeal as untimely, asserting that "[a] thorough search of the case file indicates that no appeal was received before this one in February 1993. Since this appeal is untimely, relief must be sought from the Court of Appeal." (Add. 2). Quite inexplicably, both this document, reciting that the file contains no record of respondents' December 1992 notice of appeal, and the record of that very notice of appeal are in respondent's superior court file. (Add. 1-8). Respondent then attempted to file a belated notice of appeal,

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[2] The abbreviation "Add." refers to the Addendum to respondent's Supplemental Opening Brief in the Ninth Circuit.

[3] "Please be advised that I cannot proceed with this appeal in Pro Per. If possible, a bilingual counsel would be preferable since I don't read nor speak English in order to understand my rights under due process." (Add. 4).

but the California Court of Appeals, Second Appellate District, Division 3, denied his application. (SER 165).

Respondent next filed a Petition for Writ of Habeas Corpus in the California Court of Appeals. (SER 194). The Court of Appeals denied the petition on August 26, 1993. (SER 193). On May 25, 1994, the California Supreme Court denied respondent's Habeas Corpus Petition for failure to allege sufficient facts (SER 204); on November 30, 1994, that court denied on the merits a second petition filed by respondent. (SER 218). No state court ever held a hearing on these claims or addressed the factual issues that they present.

On May 26, 1995, respondent filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California. (SER 263). Petitioner responded by filing an answer and original and supplemental returns with supplemental memoranda. (SER 103, 114, & 144). Respondent filed a traverse to the return, a supplemental reply with declaration, supplemental memoranda of points and authorities for each reply, and a supplemental exhibit. (SER 86, 93, & 133).

The magistrate judge, on February 5, 1996, issued a Report and Recommendation to the district court suggesting that respondent's petition be granted. (SER 74). Petitioner filed objections to this Report and Recommendation on February 21, 1996. (SER 61). On February 28, 1996, the magistrate judge issued an Amended Report and Recommendation, suggesting that the petition be dismissed. (SER 50). On March 13, 1996, respondent filed objections to the magistrate judge's Amended Report. (SER 42). On the same day, the magistrate judge issued a Final Report and Recommendation suggesting that the petition be dismissed with prejudice. (SER 8). On March 18, 1996, the district court adopted the magistrate's Final Report and Recommendation and dismissed the petition. (SER 6).

In October 1997 the Ninth Circuit appointed the undersigned counsel for respondent, together with three then students at the University of Washington School of Law, to represent respondent on appeal. In the Ninth Circuit, respondent raised a number of issues, including the denial of the assistance of counsel to pursue a direct appeal. On November 13, 1998, the Ninth Circuit reversed the district court on that ground and ordered that respondent be released unless the State of California vacated and reentered the judgment against respondent so that he could take a fresh appeal.

REASONS FOR DENYING THE WRIT

The proceedings in the Ninth Circuit involved two distinct issues: *first*, whether respondent was denied the effective assistance of counsel and, *second*, whether that constitutional violation should be deemed prejudicial. By weaving together elements of these two separate issues, the petition artfully suggests that the Ninth Circuit's decisions in the instant case and in *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998), *petition for cert. filed*, No. 98-1441 (U.S. Mar. 4, 1999), present a question warranting review by this Court. If, however, those issues are analyzed separately (as they are below), it is apparent that neither the instant case nor *Ortega* warrants review.

I. The Ninth Circuit's Finding That Respondent Was Denied Effective Assistance Of Counsel Presents A Fact-Bound And Relatively Uncommon Dispute.

The Ninth Circuit's decision in this case involves a fact-bound and unremarkable application of the long-standing principle that indigent criminal defendants are entitled to the effective assistance of counsel on direct appeal. *Douglas v. California*, 371 U.S. 353 (1963). Although the indigent respondent was, at least to some degree, represented by court-

appointed counsel at the trial court level, it is undisputed that respondent was not provided with counsel when he ultimately attempted to appeal. The threshold issue is whether respondent was unconstitutionally denied such counsel or, rather, whether the lack of counsel occurred because respondent failed to make an appropriate request for such representation.

The particular factual setting in which this issue has arisen here, as in *Ortega*, is fairly uncommon. Ordinarily criminal defendants are advised by their attorney, or by the court in the presence of counsel, of their rights to appeal and to representation by counsel on appeal. Claims that a defendant was denied the assistance of counsel to pursue an appeal typically fall into one of three categories: (a) if a defendant indicates that he wishes to appeal, a failure of his attorney to pursue such an appeal will violate the defendant's rights (*see Rodriquez v. United States*, 395 U.S. 327 (1969)); (b) if the defendant instructs the attorney not to appeal, that attorney's inaction obviously will not violate the defendant's Sixth Amendment rights (*see Peguero v. United States*, __ U.S. __, 119 S. Ct. 961, 67 U.S.L.W. 4154 (1999)); and (c) if at the end of the trial court proceedings a defendant well aware of his rights to appeal and to representation on appeal meets with his attorney and does not express an interest in exercising those rights, it will ordinarily be reasonable to infer that the defendant has chosen not to exercise them (and, of course, such an inference would be all the stronger in a case in which a defendant earlier agreed to a plea bargain and has indicated no objection to, or during, the proceedings that followed that agreement).

The particular circumstances of this case differ from these more common situations. The Ninth Circuit properly concluded here that "Salmon did not consent to the abandonment of his appeal." (Pet. App. A-2). That determination of non-consent is well supported by the record

in this case and, for each of the reasons set out below, does not warrant review by this Court.

First, it is undisputed here that respondent's trial court attorney violated state law, which specifically required that he "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Penal Code § 1240.1(a). Had such guidance been provided, respondent would have understood his appeal rights at a point when he could have directly indicated to his attorney that he wanted to appeal. In fact, no such opportunity ever arose: respondent claims that after the sentencing proceeding he had no further contact with his trial attorney, and petitioner asserted in the Ninth Circuit only that there was a brief conversation about the appointment of another attorney to file a motion in the trial court. (SER 12-14; Appellees' Supplemental Brief at pp. 12-14). In this Court petitioner insists that the trial court attorney had concluded that no basis existed for an appeal. (Pet. 19). Petitioner has never argued (and cannot argue), however, that Mr. Batsakis ever discussed that conclusion, or anything else related to the possibility of appeal, with respondent.[4]

Second, there is no claim here that when this matter was in the trial court respondent understood what, if any, right to appeal might exist under state law. As petitioner himself stresses, California law imposes significant restrictions on what issues can be raised on appeal following a guilty plea. (Pet. 20). A layman could not be expected to know whether any grievance he might have had with the trial court proceedings would be cognizable on appeal; such understanding was all the more unlikely in the case of

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[4] Mr. Batsakis so testified. In a declaration submitted by petitioner in this case, Mr. Batsakis explained: "there was nothing about Mr. Salmon's plea that indicated to me he would benefit from advice regarding his appeal rights." (SER 110-11).

respondent, whose English skills were so limited that he required the assistance of a translator in the state court proceedings and certainly could not be expected to understand the complexities of California law.

Third, when this case was still pending at the trial court level, respondent expressed vociferous objection to the result of those proceedings. With his attorney inexplicably silent, respondent personally advised the state judge that he wanted to withdraw his guilty plea and attempted to advance arguments as to why he should be permitted to do so. (SER 277). These objections ended not because respondent was mollified but because the trial judge insisted that the arguments be part of a formal motion—a motion that respondent's trial counsel inexplicably failed to file. These circumstances negate any possibility that respondent did not want to appeal because he was satisfied with the result of the trial court proceedings.

Petitioner does not contend that respondent actually chose not to appeal or in fact opted to waive his right to the assistance of counsel on appeal. Rather, petitioner's objection is to what it claims is a general rule—assertedly adopted in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995)—that requires a defense counsel to file an appeal from a guilty plea in any case in which a defendant has not "affirmatively" and "expressly" instructed the attorney not to appeal. (Pet. 21). The actual decision in *Stearns*, however, does not use the terms "affirmatively" or "expressly"; it requires only that a defendant "consent" to the action of an attorney in not pursuing an appeal. 68 F.3d at 330. Nothing in *Stearns* purports to detail *how* a defendant's consent need be expressed or might be ascertained; under *Stearns* there could assuredly be cases in which a defendant's silence or inaction clearly indicated such consent. This simply is not such a case.

Nor does the Ninth Circuit's decision conflict with California law. (Pet. 18-20). As previously noted, state law expressly requires defense counsel to advise their clients about

their appeal rights (Cal. Penal Code § 1240.1(a)); once that has been done, the lack of a request for an appeal would ordinarily indicate that the defendant did not wish to appeal, fully satisfying the terms of both state law and *Stearns*. The Ninth Circuit's decision does not "in effect" declare Section 1240.1 unconstitutional; to the contrary, the constitutional problem in this case arose precisely because that provision of California law was violated.

Petitioner's assertion that there is a conflict among the circuits is similarly overstated. On the one hand, the Ninth Circuit has not adopted the "express affirmative consent" rule of which petitioner complains. No Ninth Circuit decision (or district court decision within the Ninth Circuit) construes *Stearns* in that manner. On the other hand, the decisions in other circuits did not involve, and do not purport to address, the somewhat atypical circumstances of this case and *Ortega*. Thus, for all these reasons, the Ninth Circuit's finding that respondent was denied effective assistance of counsel on appeal does not warrant this Court's review.

II. The Ninth Circuit's Finding Of Presumed Prejudice Is Consistent With Seven Other Circuits And With The Decisions Of This Court And Thus Raises No Significant Issue Under *Teague v. Lane*.

The Ninth Circuit also held in this case that where a habeas petitioner has been denied his constitutional right to counsel on appeal prejudice will be presumed and the petitioner is thus not required to demonstrate that he would probably have prevailed had he had the assistance of counsel to pursue such an appeal. This aspect of the Ninth Circuit's decision, unlike the fact-bound dispute discussed above, indeed presents a question of law. But the Ninth Circuit's decision is consistent with similar decisions in seven other circuits and is entirely consonant with the decisions of this Court.

This aspect of federal law is largely controlled by a long series of decisions of this Court, dating from the Court's 1969 decision in *Rodriquez*. *See Penson v. Ohio*, 488 U.S. 75, 88 (1988); *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Chapman v. California*, 386 U.S. 18, 23 and n.8 (1967).[5] The petitioner in *Rodriquez* asserted that his trial counsel had refused to file an appeal, despite having assured his client that he would do so. The Ninth Circuit denied relief under Section 2255, reasoning that the petitioner had failed to show "some likelihood of success on [the original] appeal." 395 U.S. at 330. In reversing, this Court noted the long-standing rule that an indigent defendant is entitled on direct appeal to appointment of counsel without the need to make any showing about the likelihood of success on the merits. 395 U.S. at 330. Habeas petitioners asserting that they had been denied the assistance of counsel on direct appeal, the Court reasoned, should not be subjected to a requirement they would not have faced had the original constitutional violation never occurred. Rather, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." 395 U.S. at 327.

Two decades later, in *Lozada v. Deeds*, 498 U.S. 430 (1991), the Ninth Circuit repeated the same error it had

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[5] *See also Peguero*, 67 U.S.L.W. at 4156 ("In *Rodriquez*, we held that when a defendant's failure to appeal a conviction is attributable to an error by his lawyer, the defendant is entitled to collateral relief without requiring him to show that his appeal would have had merit.") (O'Connor, J. concurring). At the oral argument in *Peguero*, the United States characterized *Rodriquez* in a similar manner. *See* 1999 WL 20679 at p. 10 ("This Court's decision in *Rodriquez* and subsequent decisions as well of this Court I think make clear that the complete loss of the right to appeal is a form of prejudice that will entitle you to relief, collateral or otherwise, without regard to whether you in fact have presently established that you have meritorious claims.").

committed in *Rodriquez*. The petitioner in *Lozada* made allegations similar to those in the instant case: that his attorney had "failed to inform him of his right to appeal, of the procedures and time limitations for an appeal and of his right to appointed counsel." 498 U.S. at 430. As in *Rodriquez*, the Ninth Circuit held that relief under Section 2255 should be denied, and thus denied a certificate of probable cause, because the petitioner had not demonstrated that the frustrated appeal might have succeeded. 498 U.S. at 431. Again, this Court reversed, indicating that such a showing of prejudice was not required under *Strickland* and that several other courts of appeals had been properly following *Rodriquez*. *Lozada*, 498 U.S. at 431-32.

On remand the Ninth Circuit conformed its practice to *Rodriquez*, holding that "prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1991). *Lozada* itself involved a failure to appeal following a trial. Then, in *United States v. Stearns*, 68 F.3d 328, 329-30 (9th Cir 1995), and again in the instant case (Pet. App. A-1 to A-2), the Ninth Circuit held that the same presumption of prejudice should be applied where a defendant was denied the right to counsel on appeal of issues that arose out of a guilty plea or subsequent sentence. Each such holding is entirely consistent with and in fact compelled by *Rodriquez*.

Petitioner does not dispute the Ninth Circuit's conclusion that the presumed prejudice rule in *Stearns* was merely an application of the presumed prejudice rule in *Lozada*. Rather, petitioner attacks the Ninth Circuit's reliance on *Lozada* itself, objecting that circuit court case law can never by itself provide the "precedent" required by *Teague v. Lane*, 489 U.S. 288 (1989). This argument is for several reasons unavailing.

First, petitioner does not complain that *Lozada* itself was a "new rule". The Ninth Circuit in *Lozada* thought the result in that case was required by the now thirty year old decision in *Rodriquez*; petitioner does not contend otherwise. No less importantly, petitioner did not contend in its briefs in the Ninth Circuit that application of the *Lozada* presumed prejudice rule would violate *Teague*; petitioner's sole *Teague* argument was directed at the issue of whether there had been an underlying violation. (Appellees' Supplemental Brief at pp. 35-43). In short, petitioner at most objects to the methodology utilized in the *Teague* analysis in *Ortega* and followed in this case, but not to the actual conclusion reached.

Second, petitioner's contention that a clear precedent can be established under *Teague* only by a decision of this Court is patently inconsistent with this Court's decision in *United States v. Lanier*, 520 U.S. 259 (1997). In *Lanier*, the Sixth Circuit had held that the clarity of precedent required by the Due Process Clause for a criminal prosecution could be established only by a decision of this Court. The standard of clarity required for the criminal prosecution of Judge Lanier was assuredly greater than the clarity required by *Teague*. Nevertheless, this Court unanimously reversed the Sixth Circuit's ruling, and held that a decision by this Court is not required either to meet the requirement of Due Process or to defeat a claim of qualified immunity. As the Court in *Lanier* acknowledged, where the answer to a question of constitutional law is sufficiently obvious it is unlikely that this Court will have occasion to consider the question because the district courts and courts of appeals will arrive at a consensus, making review by writ of certiorari inappropriate. *See* 520 U.S. at 271 ("[t]he easiest cases don't even arise"); Supreme Court Rule 10(a).

Just such a consensus exists with regard to the applicability of the presumed prejudice rule to cases in which a habeas petitioner was denied the assistance of counsel to

pursue a direct appeal. This Court noted in *Lozada* that two circuits already adhered to that view. *See* 498 U.S. at 432 (citing *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990), and *Estes v. United States*, 883 F.2d 645, 649 (8th Cir. 1989)). That rule is firmly in place in the Eighth[6] and Tenth[7] Circuits, as well as in the First[8], Second[9], Fourth[10], Sixth[11], and Seventh[12] Circuits. Indeed, the Ninth Circuit itself recently noted: "It appears that every federal court of appeals to address the issue has applied some form of a rule of presumed prejudice where counsel fails to file a notice of appeal." *Canales v. Roe*, 151 F.3d 1226, 1229 (9th Cir. 1998). Thus, while the Ninth Circuit in this case and in *Ortega* may have relied on its own case law in applying *Teague*, that methodology was not dispositive.

Finally, any possible dispute about the significance of this methodology has largely been overtaken by other events. The Anti-Terrorism and Effective Death Penalty Act of 1996 has amended 28 U.S.C. § 2254(d) to limit habeas relief to state court rulings that are "contrary to . . . Federal law, *as determined by the Supreme Court of the United States*." (Emphasis added). This legislative change is inapplicable to the instant case, which was filed before the effective date of the AEDPA. *Lind v. Murphy*, 521 U.S. 320 (1997). But the

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[6] *See Williams v. Lockhart*, 849 F.3d 1134, 1137 n.3 (8th Cir. 1988).

[7] *See Romero v. Tansy*, 46 F.3d 1024, 1030-31 (10th Cir.), *cert. denied*, 515 U.S. 1148 (1995); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991).

[8] *Bonneau v. United States*, 961 F.2d 17, 18, 22 (1st Cir. 1992).

[9] *Morales v. United States*, 143 F.3d 94, 96-97 (2d Cir. 1998).

[10] *United States v. Peak*, 992 F.2d 39, 41-42 (4th Cir. 1993).

[11] *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998).

[12] *Fern v. Gramley*, 99 F.3d 255, 256-60 (7th Cir. 1995); *Castellanos v. United States*, 26 F.3d 717, 720 (7th Cir. 1994).

Ninth Circuit has applied this provision of the AEDPA to habeas proceedings commenced after that date. *See Canales*, 151 F.3d at 1229-31. In habeas proceedings, therefore, it appears that the rule proposed by petitioner in this case has already been adopted by statutory amendment.

CONCLUSION

For the above reasons, the petition should be denied.

Dated: April 12, 1999

Respectfully submitted,

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